IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 1185 of 2006
in
SPECIAL CIVIL APPLICATION No. 18353 of 2006
With
CIVIL APPLICATION No. 10990 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL RASHMIKABEN RAJESHKUMAR - Appellant(s)
Versus
DIRECTOR OF PRIMARY EDUCATION & 2 - Respondent(s)

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Appearance :
MR KB PUJARA for Appellant(s) : 1,
Ms REETA CHANDARANA, ASST. GOVERNMENT PLEADER for Respondent(s) : 1-2
MR PINAKIN M RAVAL for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : /01/2007

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

ADMIT.

2. Heard **l**earned advocate Shri Pujara appearing for the appellant-original petitioner, learned AGP Ms. Reeta Chandarana appearing for respondents nos. 1 and 2 and learned advocate Shri Pinakin Rawal for respondent no. 3. The learned advocates have requested that looking to the facts of the case, the appeal be finally heard today. In pursuance of the request made by the learned advocates, the appeal is finally heard today.

3. Being aggrieved by the order passed in Special Civil Application No. 18353 of 2006 dated 31st August, 2006 rejecting the case of the petitioner, the appellant-petitioner has filed this appeal.

4. The undisputed facts giving rise to the appeal, in a nutshell, are as under:

4.1. The respondent authorities wanted to recruit 'Vidya Sahayaks' (teachers), who were to work in various schools in the State and, therefore, applications had been invited from eligible persons in all districts for being selected for the said post. As per the method undertaken for selection, no oral interview was to be held, but only on the basis of marks secured by the candidates in certain examinations, selection was to be made. So as to give encouragement to sports-persons, who had participated and excelled in sports at the state/ national level, it was decided by the State of Gujarat to give certain weightage of marks to them.

4.2. The policy with regard to giving weightage of marks

to such “Ramatveers” - sports persons, had been incorporated in Government Resolution dated 25th February, 1980, a copy of which has been annexed to the petition at Annexure-C. In Clause 2(a) of the said resolution, it has been provided that whenever any candidate is to be selected for appointment to a class III or class IV post without holding an interview and on the basis of marks secured in any competitive examination, the concerned sports person should be given additional marks, which should not exceed “5 per cent” of the marks secured by him on merits.

4.3. The appellant-petitioner had secured 76.58 marks on merits as per calculations arrived at by respondent No. 3, who was to recruit Vidya Sahayaks in Gandhinagar District. It was the case of the appellant-petitioner before the learned Single Judge that she should have been given 5 additional marks as she was a “Ramatveer”. Thus, according to her case, she ought to have been given, in all, 81.58 marks and if so, she would have been selected as a “Vidya Sahayak”.

4.4. According to the calculations made by respondent no. 3, the appellant-petitioner was given 3.82 additional marks (5% of 76.58, marks secured by her on merits) and thus her total marks calculated were 80.40 (76.58 marks on merits + 3.82 marks added in pursuance of the G.R. dated 25.2.1980).

5. It is the case of respondent no. 3 that the appellant-petitioner could have been given maximum 5% of the marks secured by her on merits. As the appellant-petitioner had secured 76.58 marks on merits, 5% thereof, i.e. 3.82, marks had been added in pursuance of G.R. dated 25.2.1980.

6. It is pertinent to note that there was some controversy as to whether 5 full marks should be added to the marks secured on merits or 5% of the marks secured on merits should be added, and as the District Primary Education Officers of different districts were following different yardsticks, the State of Gujarat had issued a circular dated 9th November, 2004 giving certain clarifications. A copy of the said circular is at Annexure-D to the petition.

7. According to the aforesaid clarificatory circular dated 9.11.2004, 5% of marks secured on merits should be added in case of sports persons. The following illustration has been given in the said circular. If a sports person has secured 70 marks on merits, the said person should be given 5% thereof i.e. 3.5 marks and in such a case, the said candidate should be treated to have secured a total of 73.5 marks. Thus, there was a clarification given by the State of Gujarat to the effect that not 5 full marks, but 5% of the marks secured on merits should be added to the marks of the concerned candidate.

8. Certain petitions had been filed in this Court in the past, wherein it was submitted that 5 full marks had been given in certain cases to sports persons and, therefore, those petitioners should also be given 5 full marks and not 5% of the marks secured by them on merits. Two such petitions, being Special Civil Applications Nos. 15108 and 10021 of 2004, had been allowed and the judgements in those two petitions had been annexed to the writ petition, being Special Civil Application No. 18353 of 2006, which had been filed by the present appellant-petitioner to substantiate her case that she should be

given 5 full marks and not 5% of marks secured by her on merits, because, upon getting 5 full marks, she would have been selected as a 'Vidya Sahayak', whereas upon getting 5% marks, she was not selected as a 'vidya sahayak'.

9. Learned advocate Shri Pujara appearing for the appellant-petitioner has submitted that the learned Single Judge ought not to have rejected the petition summarily in view of the fact that the judgements in the aforesaid two writ petitions, wherein similarly situated petitioners were given 5 full marks, had been annexed to the petition. If the learned Single Judge was not in agreement with the view expressed by another learned Single Judge of this Court, the proper course for him would have been to refer the matter to a larger Bench as held by the Hon'ble Supreme Court in the case of **Somabhai Mathurbhai Patel V. New Shorrock Mills**, 1983 GLH 273.

10. He has submitted that by not giving equal treatment to the appellant-petitioner, right of the appellant-petitioner guaranteed under Art. 14 of the Constitution of India has been violated.

11. He has, therefore, submitted that this appeal be allowed and the respondents be directed to give 5 full marks to the appellant-petitioner or, in the alternative, the matter be remanded to the learned Single Judge so that the learned Single Judge can reconsider the case in the light of the judgements referred to hereinabove.

12. On the other hand, the learned advocates appearing for the respondents have submitted that only on account of mis-interpretation of the Government Resolution dated 25.2.1980, the District Primary Education Officers of

certain districts had given 5 full marks to some sports persons while considering their cases for appointment to the post of 'Vidya Sahayaks'. It has been submitted by them that only for the said reason, the circular dated 9.11.2004 had been issued so as to clarify the position and prevent the officers from making further mistakes.

13. It has been specifically submitted by learned advocate Shri Pinakin Rawal for respondent no. 3 that so far as District Gandhinagar is considered, respondent no. 3 had correctly applied the government policy with regard to giving 5% additional marks of the marks secured on merits to the eligible sports persons. He has submitted that if in other districts mistakes had been committed by the concerned District Primary Education Officers, respondent no. 3 cannot be asked to commit a similar mistake. He has, therefore, justified the order passed by the learned Single Judge, whereby the petition has been rejected.

14. We have heard the learned advocates at length and have also considered the judgement cited before this Court.

15. We are in agreement with the submission made by learned advocate Shri Pujara for the appellant-petitioner that normally, one learned Single Judge of this Court is bound by the judgement delivered by another learned Single Judge. If the learned Single Judge is not in agreement with the view expressed by another learned Single Judge, the course open to him is to refer the matter to a larger Bench.

16. In the instant case, it appears that the learned Single Judge, while rejecting the petition, was more

concerned with interpretation of Government Resolution dated 25.2.1980, and on the basis of the interpretation of the said Government Resolution, he came to the conclusion that the appellant was not entitled to 5 full marks and, therefore, he summarily rejected the petition. Possibly, he did not consider the judgements referred to in the petition. Be that as it may, in our opinion, at this stage it would not be worthwhile to remand the matter to the learned Single Judge so as to get the matter reconsidered in the light of the judgements referred to in the petition especially in view of the fact that now the matter is before a Division Bench, i.e. a larger Bench, and, therefore, instead of becoming super technical and remanding the case to the learned Single Judge, we think it proper to consider the entire issue afresh so as to bring an end to the litigation as soon as possible.

17. Looking to the clear language used in the Government Resolution dated 25.2.1980, there cannot be any doubt or ambiguity in the matter that the government had an intention to add maximum 5% marks of the marks secured by the concerned candidates on merits. The resolution does not speak of marks, but it speaks of '5%' and, therefore, all the Districts Primary Education Officers, who were adding 5 full marks to the marks secured on merits by “ramatveers”-sports person, were not correct. Looking to the language of the Government Resolution and clarification given in the subsequent circular, we come to the conclusion that maximum 5% of the marks secured on merits can be added to the marks secured by the concerned candidate and not 5 full marks.

18. Now the question is with regard to not considering the judgements delivered by another learned Single Judge,

whereby directions were given to certain District Primary Education Officers to give 5 full marks and giving discriminatory treatment to the appellant-petitioner.

19. Learned advocate Shri Pujara has mainly submitted that in view of the fact that in Special Civil Application Nos. 15108 & 10021 of 2004, this Court has given a specific direction that 5 full marks should be given to “Ramatveers”, and, therefore, the learned Single Judge ought not to have rejected the petition but should have followed the binding precedent by allowing the petition.

20. We are not in agreement with the submission made by learned advocate Shri Pujara for the reason that simply because some of the District Primary Education Officers interpreted the Government Resolution dated 25th February, 1980 in an incorrect manner, this Court should not give a direction to the District Primary Education Officer, Gandhinagar, to commit an error, though, in fact, he has interpreted the said Government Resolution. correctly.

21. There cannot be a precedent of mistake. The applicant cannot claim that since wrong had been committed in two other cases, direction should be given to respondent NO. 3 for doing another wrong. Such a direction would perpetuate the wrong, which has been done by some of the Officers. It cannot be said that the appellant is given discriminatory treatment if she is not given 5 full marks. The concept of equality under Article 14 of the Constitution of India cannot be invoked in a matter where one authority has committed an illegality or irregularity in favour of a group of individuals who belong to different districts. We fail

to see as to how Article 14 can be invoked where a patently wrong order had been made in favour of some other persons. We are of the view that the principle of equality incorporated under Article 14 would not apply when the order relied upon is either illegal or unsustainable in law. It is a settled legal position that the doctrine of discrimination is founded upon existence of an enforceable right. Therefore, we do not accept the submission of the learned advocate for the appellant that the appellant has been given discriminatory treatment as she has not been given 5 full marks.

22. Our aforestated view has been supported by the law laid down by the Hon'ble Supreme Court in the case of **STATE OF HARYANA AND OTHERS Vs RAM KUMAR MANN**, (1997) 3 SCC 321. The Hon'ble Supreme Court has observed in the said case that a wrong order cannot be the foundation for claiming equality for enforcement of such a wrong order. Thus, right of the claim must be founded upon enforceable right and a wrong decision would not give a right to enforce similar wrong order and claim parity or equality.

23. For the aforestated reasons, this Court cannot give a direction for giving 5 full marks to the appellant as that would not be in consonance with the policy of the State of Gujarat laid down under the Government Resolution dated 25th February, 1980 and the clarification contained in circular dated 9th November, 2004. We do not approve the view expressed by the learned Single Judge in Special Civil Applications Nos. 15108 and 10021 of 2004. If one closely reads the judgements referred to in the petition, it is clear that though the learned Single Judge did not agree with the interpretation given by those District Primary Education Officers, who had given 5 full marks, partly because of the concession given by

the learned AGP or partly because there were vacancies so as to accommodate more candidates, and due to the fact that in certain districts, incorrect interpretation was given to the Government Resolution dated 25th February, 1980, the learned Single Judge had directed to follow a consistent practice. Thus, the said judgements had been delivered because of certain peculiar circumstances and the said circumstances do not exist in the instant case and giving such a direction would amount to giving a direction to do something wrong, which will perpetuate another wrong which this Court would not like to do.

24. In view of the aforestated reasons and observations, we do not find any substance in the appeal, and, therefore, the appeal is dismissed with no order as to costs.

25. In view of dismissal of the appeal, the Civil Application is also disposed of with no orders.

(Anil R. Dave, J.)

(H.N. Devani, J.)

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